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of commercial ethics, it has entrusted to an administrative body, which is "invested with the power to ascertain the facts and conditions to which the policy and principles apply."¹⁹ The limitation upon the power so granted is the "common sense" of that body, restrained and guided by the supervising hand of the court in those cases where its "common sense" would prescribe courses of conduct too greatly at variance with the "common sense" of the remainder of the community.²⁰

E. M. P.

ADMIRALTY: LIABILITY OF VESSEL REQUISITIONED BY THE UNITED STATES UNDER THE SHIPPING ACT.—Courts have often drawn a distinction between suits against property owned by a sovereign where it was being used in public business, and where it was being used in private or commercial matters, the sovereign's immunity being denied in the latter case.¹ There was some doubt whether the same distinction was recognized by Congress in the act creating the United States Shipping Board, wherein it was provided in regard to requisitioned ships: "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."² The importance of this question is apparent to everyone who

¹⁹ Mr. Justice McKenna in *Mutual Film Co. v. Ohio Indust'l. Comm.* (1914) 236 U. S. 230, 59 L. Ed. 552, 35 Sup. Ct. Rep. 387, upholding an Ohio statute granting to an administrative body the authority to sit in censorship upon moving pictures to be displayed in the state.

²⁰ Interesting developments in this connection may be expected as a result of recent activities of the commission in question concerning resale price maintenance. Generally speaking it has been a principle of our law that the government shall not select a trader's customers for him. *Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.* (1915) 224 Fed. 566, affirmed 227 Fed. 46. The cases are collected by Rome G. Brown, *The Right to Refuse to Sell*, 25 Yale Law Journal, 194. Yet *In re Auto Strop Razor Co.* and *In re Clayton F. Summy Co.*, Federal Trade Commission Bulletin, April 22, 1919, are cases wherein the commission has forbidden the manufacturer to stop selling to jobbers who refused to sell at prices prescribed by the manufacturer. Query as to the enforceability of the commission's order? No prosecution lies for refusal to sell under these circumstances either under the Sherman Act, *U. S. v. Colgate & Co.* (1918) 253 Fed. 522; or under the Clayton Act, *Baran v. Goodyear Tire & Rubber Co.* (1919) 256 Fed. 570. See comment on these cases at 28 Yale Law Journal, 505. On this general subject see W. H. S. Stevens, *Resale Price Maintenance as Unfair Competition*, 19 Columbia Law Review, 265.

¹ *The Davis* (1870) 10 Wall 15, 19 L. Ed. 875.

² Act of September 7, 1916, ch. 451, § 9, 39 U. S. Stats. at L. 730; Fed. Stats. Ann., 1918 Supp., p. 789.

might have a claim against the operator of such a vessel.³ At last the Supreme Court has been called upon to interpret this statute in the case of *The Lake Monroe*.⁴ This was a vessel which had been requisitioned by the President while in the process of construction, he acting either through the United States Shipping Board directly or through it by way of its arm and agent, the Emergency Fleet Corporation, and acting by virtue of his powers under the Deficiencies Appropriation Act.⁵ The *Lake Monroe* after requisition was assigned to private persons for operation, and by them was chartered to a coal and fuel company in whose control she was at the time she was libelled for collision. The court held that the case was to be governed by the provisions of the Shipping Act above referred to, and that ships, though requisitioned by the President under another act were nevertheless subject to the Shipping Act.⁶ On the ground that the vessel was employed solely as a merchant ship, she was held subject to lien.⁷ The case settles definitely what have heretofore been very disputed points. (1) There can be no doubt now but that a government requisitioned ship is liable for damages resulting from collision. The law is otherwise in England.⁸ It was considered an open question here, notwithstanding section nine of the Shipping Act. (2) The liability of government-requisitioned ships is the same as that of "privately owned merchant vessels with which they compete."⁹ (3) Where a collision or maritime lien would attach to a privately owned vessel, it will attach to a ship requisitioned by the government. (4) Such a lien is enforceable "by judicial process in admiralty."¹⁰ In general the case clears away any lingering notion that the effect of section nine of the Shipping Act was simply to impose restrictions similar to the navigation laws relating to registry, inspection, etc.

³ Professor A. T. Wright, *Government Ownership and the Maritime Lien*, 7 California Law Review, 242; "... it is not improbable that the absence of a prompt and expeditious remedy may deter the shipper from shipping his goods on government vessels, the sailor from signing articles for service upon them, the salvor from salvaging them, the charterer from chartering them, and the Chandler and repairer from supplying and repairing them on any but disadvantageous terms; while he whose ship is in collision with a government merchant ship will be even worse off, for he cannot avoid the thing that runs him down."

⁴ (June 7, 1919) 39 Sup. Ct. Rep. 460; Same case. In *Matter of the Petition of the United States*, 63 L. Ed. Adv. Op. 573. The opinion of the District Court is reported in 258 Fed. 77.

⁵ Act of June 15, 1917, ch. 29, 40 U. S. Stats. at L. 182; U. S. Comp. Stats. 1918, § 3115 1/16 d. Fed. Stats. Ann., 1918 Supp., p. 804.

⁶ *The Lake Monroe*, supra, n. 5, at p. 462.

⁷ *The Lake Monroe*, supra, n. 5, at p. 463.

⁸ *The Broadmayne* (1916) Prob. Div. 65; 85 L. J. R. Prob. Ad. & Div. 153. See also the *Eolo* (1918) 2 Ir. 78, where a salvage claim was held unenforceable against a vessel requisitioned by Italy.

⁹ Supra, n. 4, at p. 463.

¹⁰ Supra, n. 4, at p. 464.

The effect of the statute is to impose on government ships the same liability as exists in the case of privately owned vessels, and to subject them to the same remedies in the admiralty courts, thus making unnecessary any costly and tedious suits in the Court of Claims.

However, the case leaves undecided the important point of whether or not the Shipping Act was intended to apply to ships operated by or chartered by the Shipping Board directly. The statute provides for liability only when the vessel is "purchased, chartered or leased from" the Shipping Board.¹¹ The case seems to indicate that it is immaterial under what arrangement the vessel is in fact operated by the board, because the court went to the length of deciding that an agreement whereby the shippers paid a stipulated rate per ton for the cargo carried is a "charter" within the meaning of the act, and also that the act covers a contract for the temporary use of a vessel or its services.¹² But suppose a vessel is chartered by the Shipping Board from a private owner and such vessel commits a tort—can she claim government immunity? This question has not been answered.

Nor has any answer been made as to what attitude the trial court should take when Shipping Board vessels are libeled. Are they *prima facie* government-owned public ships and therefore immune from arrest until proved to be within the terms of the statute?¹³ Or is the mere fact that they are operated under the Shipping Board sufficient to show they are subject to the statutory penalty?¹⁴

What is a merchant ship seems to be a question of fact. The court found that the mere fact that the *Lake Monroe* was engaged in the coal trade which was then under control of the Fuel Administration and vitally connected with war activity was insufficient to take the vessel out of the category of merchant ships.¹⁵ The mail ship of a sovereign state carrying supplies and

¹¹ *Supra*, n. 4, at p. 463.

¹² *Supra*, n. 4, at p. 463.

¹³ *The Florence H.* (1918) 248 Fed. 1012 held that such vessels were *prima facie* liable by statute, and the burden was placed upon the government to show that the vessel was used in public service and therefore immune from arrest.

¹⁴ In the *G. A. Flagg* (1919) 256 Fed. 852, it was held that a government vessel was exempt from arrest on general principles and the burden was placed upon the libellant to show that she was employed solely as a merchant ship, within the terms of the statute.

¹⁵ *Supra*, note 4, at p. 463. See also *The Jeanette Skinner* (1919) 258 Fed. 768, where a Shipping Board vessel assigned to carry food to the Swiss government was held to be "employed solely as a merchant vessel." This vessel was commanded by officers of the United States Navy and had a naval crew. The court said, "Whether she was or was not [employed as a merchant vessel] is to be determined by the nature of the work in which she was engaged, and not by the particular department of the government to which her officers and crew belonged."

passengers,¹⁶ and a ferry boat in the service of the government-owned Canadian Railway¹⁷ have both been held immune from seizure in English courts. These cases may not be in point for the reason that the English courts ordinarily do not distinguish between suits against a sovereign and those against his property, both being denied.¹⁸

The Lake Monroe is indicative of a broad attitude on the part of the Supreme Court towards our growing merchant marine. The existing law which has been characterized in an earlier article of this Review as "incomplete, confused, and unprepared to meet the problem, which has come to us together with our new merchant fleet"¹⁹ has been radically changed. A class of vessels for which no one is responsible is not desirable.²⁰ A broad interpretation of section nine of the Shipping Act will allow but a small class of vessels to escape the liability now existing as to all privately owned ships.

G. H.

MINING LAW: LOCATIONS: PRIORITY OF CLAIMS: EQUITABLE DECREES.—The conclusion reached by the United States Supreme Court in the case of *Butte and Superior Copper Co. v. Clark-Montana Realty Co.*,¹ commonly referred to as the Elm Orlu Case, establishes the three following propositions:

1. That failure to comply with a minor requirement of a state statute concerning the notice of location of a mining claim does not result in a forfeiture of the claim where there was actual knowledge of the existence of the location;
2. That issuance of patent to the conflict area embraced within two conflicting locations does not necessarily settle the question of seniority;
3. That reserving a portion of the dispute for a subsequent decree does not prevent a decree as to the facts then determinable.

¹⁶ The Parliament Belge (1880) L. R. 5 Prob. Div. 197.

¹⁷ Young v. S. S. Scotia (1903) A. C. 501.

¹⁸ The Parliament Belge, supra, n. 19; Vavasour v. Krupp (1877) 9 Ch. D. 351; see also The Siren (1868) 7 Wall. 152, 19 L. Ed. 129.

¹⁹ Supra, note 3, at p. 244.

²⁰ See The Crimdon (Prob. Div. 1918) 35 T. L. R. 81, 82-83: "... the inconveniences, and in some degree the dangers resulting from immunity from arrest are, in my humble judgment, very considerable.

"It is in my view a great hardship upon the persons who have claims against such privately-owned vessels [in Government use] that they should lose their most substantial remedy; and in the interest of safe navigation it is most unfortunate that there should be a great number of vessels navigating the seas whose owners know that however negligently they may be navigated no maritime lien can be enforced upon the vessel while she is in State employment."

¹ (March 3, 1919) 10 U. S. Supreme Court Advance Opinions 295.